

FILED
MISSOULA, MT
2006 JUL 20 PM 5 46
PATRICK E. DUFFY
BY _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

Ginger Hageman,
Plaintiff,
vs. CV-06-09-M-DWM

ORDER

Richard Gebhardt,
(Plains Town Attorney)
Chief Shawn Emmet,
(Plains Police Department)
Ernest Cahala,
(Plains Police Officer)
Joe Brown,
(County Coroner)
Laurie Sharp,
(Deputy Coroner)
Robert Zimmerman,
(Sanders County Attorney)
Defendants.

Ginger Hageman,
Kent Wood,
Christine Wood,
Plaintiffs, CV-06-45-M-DWM
vs.

Richard Gebhardt,
(Plains Town Attorney)
Chief Shawn Emmet,
(Plains Police Department)

Ernest Cahala,
(Plains Police Officer)
Joe Brown,
(County Coroner)
Laurie Sharp,
(Deputy Coroner)
Robert Zimmerman,
(Sanders County Attorney)
Gene Arnold,
(Sanders County Sheriff)
Defendants.

I. Overview

This Order addresses Judge Leif B. Erickson's Findings and Recommendations from May 22, 2006 (dkt #15) and June 6, 2006 (dkt #22) in CV 06-45. Judge Erickson entered these Findings and Recommendations before CV 06-09 and CV 06-45 were consolidated on July 14, 2006. Plaintiffs objected to each Findings and Recommendation.

Because Plaintiffs timely objected they are entitled to de novo review of the record. 28 U.S.C. § 636(b)(1) (2000).

II. Analysis

A. The May 2006 Findings and Recommendation

Judge Erickson correctly recommended denying Plaintiffs' motion for default judgment. Hageman argues default judgment is warranted because Defendants did not timely respond to the filing and service of her Complaint. However, Hageman's use of the mail to serve Defendants does not suffice.¹ Hageman failed to serve

¹ The Rules require service of the summons and complaint by a person who is not a party to the action and is at least 18

Defendants under Federal Rules of Civil Procedure 4(c) and (e). Under Rules 4(c) and 12(a), if Hageman had complied with the dictates of personal service, Defendants would have had 20 days to respond. Instead, Rule 4(d) applies. Therefore the time to respond, 60 days, as set forth would apply if the serving party obtains a waiver of service.

Hageman contends Defendants were properly served when they received the Complaint and summons on March 7 or 8, 2006. Hageman argues this delivery constituted effective service because Defendants signed for receipt of the certified mail delivery of the summons and complaint. She asserts the United States Postal Service effected personal service upon Defendants pursuant to Rule 4(c). That is not valid. In Montana the Post Service is not an avenue for effective personal service. See *Blaskovich v. Blaskovich*, 249 Mont. 248, 815 P.2d 581 (1991). Hageman has not otherwise established how she personally served Defendants—among other things, she has not filed an affidavit demonstrating compliance.

Upon review, Defendants have not been served in compliance with Rule 4(d) either. Gebhardt, Emmett, and Cahala contend they have not given an acknowledgment or waiver of service. Brown, Sharp, Zimmerman, and Arnold assert they have not received a

years of age. That person must subsequently submit an affidavit affirming proof of service pursuant to Rule 4(l).

request for waiver. The file supports these contentions. Consequently, Plaintiffs have not properly served any of the Defendants. Despite this fact, Brown, Sharp Zimmerman, and Arnold filed their Answer on May 15, 2006. In any event, none of the Defendants are in default.

Plaintiffs objected, stating that a Post Service courier does comply with the rules, but that is simply not the case. Plaintiffs should understand they are proceeding *pro se*, which is their constitutional right; however, as *pro se* litigants Plaintiffs may not fully understand the rules and laws that apply. Nonetheless, Plaintiffs will be required to abide by those rules and laws.

B. The June Findings and Recommendation

Hageman also sought an entry of judgment because as she avers, Defendants did not timely answer where they failed to answer in their individual capacities. Judge Erickson's recommendation for denial is on the mark.

Hageman thinks that because Defendants answered in their official capacity, they have not answered in their individual capacities. While Defendants may be represented by attorneys who are associated with Defendants due to Defendants' official capacities, that does not mean those attorneys do not represent Defendants individually as well. Indeed, as Judge Erickson noted, their Answers address all aspects of the claims filed.

Hageman is in error.

In this instance Hageman objected, stating that as a tax payer she should not be providing the funds that may contribute to the defense of Defendants. This point has no merit in the question before the Court. She further contends that she did not consent to Magistrate Judge Erickson. That is correct, but the Court referred the case to Judge Erickson with the condition that it would rule on Judge Erickson's Findings and recommendation.

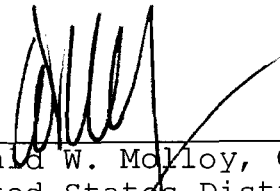
III. Conclusion

Accordingly, IT IS HEREBY ORDERED that Judge Erickson's Findings and Recommendations are adopted in full.

IT IS FURTHER ORDERED that Plaintiffs' motion for default judgment (dkt #7) is DENIED; and

IT IS FURTHER ORDERED that Plaintiffs' motion for entry of judgment (dkt #19) is DENIED.

DATED this 28th day of July, 2006.



Donald W. Molloy, Chief Judge
United States District Court